viewing the circumstances attending submission of the demands, and questions of international law involved, Dr. Wang said:

For the following reasons, therefore, the Chinese delegation is of the opinion that the Sino-Japanese treaties and exchange of notes of May 25, 1915, should form the subject of impartial examination with a view to their abrogation:

1. In exchange for the concessions demanded of China, Japan offered no *quid pro quo*. The benefits derived from the agreements were wholly unilateral.

2. The agreements in important respects are in violation of treaties between China and the other powers.

3. The agreements are inconsistent with the principles relating to China which have been adopted by the Conference.

4. The agreements have engendered constant misunderstandings between China and Japan, and, if not abrogated, will necessarily tend in the future to disturb friendly relations between the two countries, and will thus constitute an obstacle in the way of realizing the purpose for the attainment of which this Conference was convened. As to this, the Chinese delegation, by way of conclusion, can, perhaps, do no better than quote from a resolution introduced in the Japanese Parliament in June, 1915, by Mr. Hara, later Premier of Japan—a resolution which received the support of some one hundred and thirty of the members of the Parliament.

The resolution reads:

"*Resolved*, That the negotiations carried on with China by the present government have been inappropriate in every respect; that they are detrimental to the amicable relationship between the two countries and provocative of suspicions on the part of the powers; that they have the effect of lowering the prestige of the Japanese Empire; and that, while far from capable of establishing the foundation of peace in the Far East, they will form the source of future trouble."

The foregoing declaration has been made in order that the Chinese Government may have upon record the view which it takes, and will continue to take, regarding the Sino-Japanese treaties and exchange of notes of May 25, 1915.

THE AMERICAN POSITION

Mr. Hughes closed the discussion by stating the American protest, made at the time the demands were submitted, and reserved all American rights in the regions affected by the demands, respecting the Japanese offer to allow the consortium to participate in loans in Manchuria and Mongolia. Mr. Hughes said:

As to this, I may say that it is doubtless the fact that any enterprise of the character contemplated, which may be undertaken in these regions by foreign capital, would in all probability be undertaken by the consortium. But it should be observed that existing treaties would leave the opportunity for such enterprises open on terms of equality to the citizens of all nations. It can scarcely be assumed that this general right of the treaty powers in China can be effectively restricted to the nationals of those countries which are participants in the work of the consortium, or that any of the governments which have taken part in the organization of the consortium would feel themselves to be in a position to deny all rights in the matter to any save the members of their respective national groups in that organization. I therefore trust that it is in this sense that we may properly interpret the Japanese Government's declaration of willingness to relinquish its claim under the 1915 treaties to any exclusive position with respect to railway construction and to financial operations secured upon local revenues in south Manchuria and eastern inner Mongolia.

After closing the discussion of the 21 demands by putting the several statements in the record, the Far Eastern Committee adjourned *sine die*.

CAN ITS FUNDAMENTAL IMMORALITY BE ELIMINATED FROM INTERNATIONAL LAW?

By STEPHEN HALEY ALLEN *

IT IS my purpose in this article to challenge the soundness of that doctrine of international law which accords to a nation such absolute, unlimited sovereignty that it may wage war at will.

States, being regarded as artificial persons, subject to no governing power, are likened to people in a state of perfect liberty, and therefore entitled to similar freedom of action. But in the days of Cain, and thenceforth till the present time, no corresponding right has been recognized as belonging to a private person, either in savage or civilized society. Fights and killings have occurred in all stages of social organization, but the recognized principles of private conduct have never included the right to kill a member of the tribe, clan, kingdom, or nation at will. The existence of international law being recognized, it, like municipal law, imposes restraints and obligations. Whatever binding force it has limits the sovereignty, the complete independence, of the state. The sole purpose of law is to define rights and impose duties and obligations, and it necessarily limits the liberty of the individual and curtails the sovereignty of the state that is bound by it.

Blackstone's definition of municipal law is inapplicable to international law, for it is not "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." Nor can it fairly fall within Bouvier's definition, "The rules and methods by which society compels or restrains the actions of its members," or any other accepted definition of municipal law. Its fundamental lack is of an enacting and enforcing superior. Its principles have never been formulated by any authorized person or body of persons, nor is there any agency authorized to declare and interpret them with binding force on all. The sanctions for its enforcement are such, and such only, as the nations separately apply. The purpose of The Hague conferences was to curb militarism and give to international law more definite form and binding force. The doctrine of full national sovereignty was not directly challenged. The conferences were not successful in their efforts to prescribe rules that combatants would observe in a desperate war; yet the conscience of the world not only approves their purpose, but demands much more radical reforms in the laws governing international relations. The World War has again shown that *jus belli* fails to restrain the conduct of belligerents when restraint is most needed. Specifications of its contemptuous disregard would include numberless acts violating substantially all its humane principles.

With the absolute independence and full sovereignty of each nation as the major doctrine of international law, by what ultimate test may the soundness of any of its principles be determined? Manifestly it must be by a standard that commends itself to intelligent, dispas-

* Formerly a justice of the Supreme Court of Kansas, author of "The Evolution of Governments and Laws," "International Relations," etc.

sionate people everywhere. In other words, it must accord with human conceptions of the moral law, the Divine law, the law of nature. When we seek an authoritative expression of the Divine law, we are confronted not merely with the conflicting claims of authenticity of the sacred books of the diverse religions, but also with different interpretations of our own sacred book. What did Christ teach concerning peace and war, and did he speak in a positive or only in a Pickwickian sense? If international law is to be world-wide in its operation, it of course must apply to all countries and to believers in all religions. There seems to be very little prospect of general agreement as to the truth and authenticity of the various books regarded as sacred, but there is little difference in the fundamental conceptions of morality of all civilized people. All normal people everywhere regard it as wrong to kill, to rob, to injure, and as a duty, more or less obligatory, to help each other in need. The Hindoo believers in the doctrine of reincarnation carry the prohibition against killing to what Europeans regard as an absurd extreme and deny the right to kill any animate creature. The teachings and practices of the Chinese are also eminently pacific in their dealings with other nations.

International law as now taught is a European product, slightly influenced by American descendants of European ancestors. The nations that have given it form are those that were stimulated by and have profited most from the use of the mariner's compass and the discovery of the New World. The maritime nations seized portions of it and killed, drove out, or subjugated the weak natives. Great Britain dominated in the north, Spain and Portugal in the south. As between these nations and the aborigines, there was no law but that of superior force, which they were abundantly able to apply. Their conflicts with each other, however, over possessions so acquired were far more serious and caused devastating wars on both continents. The Indians of North America were not sufficiently numerous to make serious resistance, and those of Central and South America, though more numerous, lacked weapons for defense and were equally helpless. The famed wealth of densely peopled India and China also lured the covetous. The pacific principles and habits of their people rendered them easy victims for the fierce, aggressive warriors of Europe. Great Britain, France, and Holland gained mastery over vast areas inhabited by many times the numbers of people in their own countries. No principles of law or justice applied to these conquests, nor were any of them due in any measure to wrongs done the Europeans by the Asiatics.

Having planted colonies throughout the Americas, they and the colonists coveted products beyond those of their own labor. They therefore enslaved some of the natives and imported Africans and sold them to the colonists as slaves. The Portuguese commenced trading in slaves before the discovery of America, but the traffic did not assume importance until there was a demand for them in the colonies. The slave trade reached its maximum just prior to the American revolution, when about 74,000 a year were transported from Africa to America in British, Dutch, French, Danish, and Portuguese ships. The immorality of the traffic was recognized by the people of these countries, and one by one they prohibited their ships from continuing in it. Portugal, the first to engage in and last to abandon it, did not put an end to the trade till 1836. Nations which openly sanctioned the capture, transportation, and enslavement of human beings, with all the cruelties and horrors incident to such doings, could hardly claim high rank in morality or civilization.

The poison of this vicious business infected America, and, as Professor Potter points out in his very interesting article in the April, 1921, *Journal,* on "The Nature of American Territorial Expansion," furnished the incentive for the Mexican War, the only really aggressive war ever waged by the United States. It is pleasant to feel that we are a peace-loving people, devoid of imperialistic ambitions; but in weighing our claim to superior morality let us not forget that we already have enough of the best part of the world for several times our present population, while the Europeans are continually knocking elbows with their neighbors, or that slavery was an institution of our own till 1863. We might have difficulty in proving that on the whole our morality is superior to theirs.

Now this very matter of the slave trade affords proof both of the recent barbarism of ourselves and our European cousins, and of our and their rapid moral advancement, for it was the very nations that had been foremost in the slave trade who joined with other powers in the "General Act for the Repression of African Slave Trade" of July 2, 1890, and put an end to it. The co-operation of so many great nations in abolishing this grossly immoral traffic was a most cheering proof of advancing moral standards, as well as of possible international combination for the achievement of moral purposes.

Perception of the advantages to be gained from an exchange of products has now brought the world to the age of commercial rivalry, with its many dangers from greedy combinations seeking gains through the use of political and military forces. Not the least of the evil tendencies persisting after the war is that to use the power of the nation to direct and control trade in the interest of more or less limited classes of citizens. This sordid purpose seems much in evidence in America as well as in Europe. To America, foreign trade is advantageous; to the densely peopled countries of Europe, it is a necessity. It is not necessarily dependent on sovereignty or political ties, but will thrive when allowed to dig its own channels without obstruction. The wealth of America has enriched the mother countries of Europe since the colonies were relieved from monopoly of their trade far more than under their rulership. The incentive for the greatest war of all time was probably quite as much desire for commercial advantage as for political dominance. The results again demonstrate the futility of war as a remedy for economic ills.

The descendants of the Norwegian and Danish pirates, who from the seventh to the tenth centuries sallied forth to pillage the more fruitful lands of the south and west, took no part in the war, but as neutrals engaged in peaceful trade, had their shipping and goods destroyed by the belligerents and their business obstructed. On the other hand, they profited from the branches of trade that were stimulated by the war. This war was another effort of the Germanic tribes, now so swollen in num-

bers, to overrun and subjugate their neighbors. Though so vastly superior in the arts of peace and war to their ancestors, who, under Arminius, in A. D. 6 destroyed the Roman legions, the great German Empire was dominated by those who still adhered to the principles of the ancient barbaric Teutons, Cimbri and Marcomanni.

Since the days of Frederick the Great, the Prussians had been educated in the immoral code of war, and their god was a god of "blood and iron." The Norwegians had long centuries before abandoned their piratical enterprises and with more and better ships sailed the seas as traders and carriers. The small booty gained by pillage was infinitesimal compared with the wealth derived from commerce. Their kinsmen, the Danes, now gain far more from the sale of their butter to the people of England than their ancestors ever got by plundering them. The small countries of Europe that preserved their neutrality have had another lesson in the unprofitableness as well as the immorality of war, and are eager for some plan that will secure the world against a recurrence of wars. But what of France, Italy, Russia, Rumania, Bulgaria, Greece, and the new Poland, Czecho-Slovakia, Jugo-Slavia, and States of the Baltic? There are signs of the dominance of the war spirit in many of them. States that feel cramped in their narrow boundaries seem still inclined to shove their way into the lands of their neighbors by force, rather than to break down the barriers of artificial political boundaries and join with them in mutually profitable enterprises.

If the rising generation of Europe could be educated in schools common to all and taught the useful lessons of peaceful morality, of mutual help, combined effort, and universal good will, the dangers from the baneful activities of courtiers and their republican successors would be minimized. The narrow patriotism that inculcates distrust of and hostility toward neighboring people and the doctrine of sovereign right to wage war at will bars the path of education in international morality.

Now, coming more directly to the great question I am trying to discuss, is there sufficient moral stamina in the world to cause the aggressive nations to abrogate their time-honored sovereign right to wage war for the promotion of their material interests? The United States, whose people include all European stocks, can and ought to lead. The States severally have given up all claims of right to war with each other, and have made ample provision for the peaceful settlement of every dispute. Great Britain may well adopt a pacific policy, for her Empire, like that of the United States, abounds in material wealth and unoccupied lands. France, too, appears to have sufficient land for her people, and Spain is not badly cramped for room.

All the republics of America, South as well as North, would doubtlessly readily agree that no nation has the right to initiate war against another. But what of the interior States of Europe, that have no colonial possessions, can only expand at the expense of each other, and are already too populous for their area? Separately, they are dependent on foreign supplies. If all Europe could act collectively, with full co-operation and good fellowship, there need be no fear of want anywhere. It might easily be self-sustaining without help from any other continent. The waste of war and of preparedness for war, reversed and devoted to beneficial uses, would afford the necessaries of life for all in ample measure; yet selfishness, vanity, narrowness of vision, inherited hostility, fear and distrust, obstruct the flow of kindly sentiments across national boundaries and prevent co-operation of the people of neighboring States. Commercial rivals seek success through the aid of political and military forces instead of friendly combination. Whether the form of government be monarchical, republican, or soviet, it yields to the demands of the dominant domestic forces. These are inevitably tinged with class selfishness in greater or less degree. The hardest and most conscienceless of them stand out for sovereign right in the state to promote their interests by war and demand military and naval protection at home and abroad.

The concept of the state as a distinct entity and sovereign as such is not new. It was familiar to the ancient Greeks. It reached full expression in the unlimited monarchy, in which the king stood not merely as the symbol of the state, but as the sole repository of all its political powers. The idea of sovereignty was intensified and the importance of the subject minimized. War and peace were dependent on the will of kings or of the favorites having controlling influence with them. From Grotius to Vattel, the formulaters of international law dealt with conditions in a Europe dominated by crowned heads whose conceptions of morality were so low that it was difficult to distinguish them from those of the pirates on the seas who flourished in their time. Both took by force whatever they coveted and were able to get. Moral advancement has come, however, in spite of kings and pirates. The people who produced the wealth on which they preyed have cleared the pirates from the seas and the despots from the thrones, yet the notion of sovereignty and of sovereign right in the state to force its citizens to fight to promote selfish interests still persists. Patriotism is taught in the schools as a prime and indispensable virtue. Sovereignty in the state, subject to no limitation from external authority or binding law, has been the pride alike of statesmen and private citizens; yet only by the subordination of all nations to binding law which accords with moral principles can real civilization be hoped for, either in the world at large or the nations separately. . . .

Here lies the great difficulty of the problem. If the nations are absolutely sovereign and independent, they are subject to no law. Municipal law limits the liberty of the citizen so far as is necessary, in order to allow equal liberty to all other citizens—or is supposed to do so. In highly developed countries this imposes a multitude of duties and restrictions of conduct on indviduals. International law, to be law, must similarly affect the liberty of nations. The Roman Empire for some centuries obviated the necessity for international law by a combination of substantially all of the nations of the known world under one government. The continuance of its mastery was due far more to wise policy than to its legions. Out of the chaos of the dark ages which followed the fall of the Empire came the feudal system, with rulership based on military combination to maintain possession of land. Though the forms of combination have undergone many radical changes in the suc-

ceeding centuries, the military spirit still survives and nations seek larger territory at the expense of their neighbors. In order that they may be free to take it by force, sovereign right to wage war must be recognized.

Inventions and the combinations that utilize them have now brought all the diverse parts of the world together; so that the nations crowd and jostle each other. To preserve order among them, it is necessary to regulate their conduct by law. To do this will necessarily destroy all of what may be called external sovereignty and limit their absolute authority to their respective countries.

Recognition of sovereign right to wage war implies as a corollary the superior rights of belligerents over those of neutrals; for the warring nations, having thrown off the moral restraints recognized in peace, broke no obstructions in the path to victory. How often has this been manifest during the great war! Municipal law always and everywhere holds the rights of private combatants inferior to those of peaceful citizens. If, in shooting at his enemy, one accidentally kills a bystander, it is murder, for his purpose to kill his adversary was criminal; but if a neutral vessel on the high seas comes within the range of the guns of belligerent ships and is accidentally sunk by a stray shot, there is no redress, for international law imposes the burden on it of keeping out of the way of harm from fighting vessels. Still more extreme are the rights accorded belligerents of search and seizure of neutral vessels and cargoes of contraband goods. Though the sea is the common property of all nations, in equal right, when two or more of them are at war, exclusive right is accorded to combatants in the immediate zone of their naval warfare.

We have now reached an age of conscious law-making and are no longer content to await the slow evolution of custom and consensus of the reasonings of philosophers. We have the right to locate responsibility for whatever is wrong, in either municipal or international law, and demand its correction. The number of persons who in fact have had any appreciable influence in the formulation of international law is small. There are far more who now study its principles, though they are very few compared with the number of people in the world.

All the people in a country are vitally interested in all questions concerning war, yet under the present state of organization and education in most countries a very few persons may ordinarily lead their country into war. The question, therefore, is not determined by the general intelligence and morality of the country, but by the principles of the few who are in a position to dictate its policy. How many men are directly responsible for the World War? Whatever their names or number, they were in the actual control of the governments of Germany and Austria-Hungary and wielded the sovereignty of those empires. Their power was based on the principle of sovereign right to wage war at will, and in using it they but followed numberless precedents. Fighting having commenced, international law accorded them the same right as belligerents that it did to Belgium and France.

The great service performed by Grotius did not consist in formulating a system of just laws to be observed in his time. Nothing would have been accomplished by an attempt to do so. It would have been as futile as a law of pirates that forbade them to rob. The principal business of governments at that time was to wage war for the subjugation of other people. The very great work he did accomplish was to show that some rules governing the relations of nations in war and peace were generally recognized and observed, and in defining those rules. He wrote to lead his age, the age of military despotism, to be governed by law in war and peace. This is the age of invention, education, industry, commerce, and republics. Law bred from the strifes of his time is not suited to ours. Municipal law is always a laggard, trailing along after experience and enlightenment show the way. International law is naturally still farther behind the times and waits on the progress of the more backward nations. What is its present status? Let us summarize;

It is self-evident that war is immoral.

International law admits the right of a nation to initiate war.

International law is immoral in this its most important particular.

The natural rights of peaceful neutrals to pursue lawful enterprises are superior to those of belligerent nations engaged in the immoral operations of war.

International law denies these rights and sanctions immoral interference with them.

International law is immoral in this its next most important particular.

International law is a product of the works of European rulers, statesmen, and philosophers, acquiesced in by Americans.

Europe and America accept and use these immoral laws for the determination of the rights of nations.

Europe and America are responsible for the results of all this immorality.

What answer would the responsible heads of the governments of the world make to a demand for the application of the obvious principles of the moral law to the relation of States to each other? Probably that it is a beautiful dream, but impracticable.

No League of Nations can insure the peace of the world while it concedes to each nation the ultimate determination of the rightfulness of its own acts. The law must be a rule superior to the will of any power. No court can perform the full functions of a court unless it can invoke and apply rules of conduct by which the sovereignty of nations is limited. The law must be superior to all sovereigns, and the court, as the mouthpiece of the law, must be superior to the men who wield the sovereign powers in international affairs. The heads of governments appear generally to be sticklers for the most ample measure of liberty for their nation. In exercising this liberty, they in fact tyrannize over the people of their own country as well in preparations for war as in precipitating it.

EDITOR'S NOTE.—This interesting discussion by Judge Allen leads us to remark that many established rules of international law now need to be restated, amended, and supplemented. The war has resulted in a variety of divergent views upon this whole matter. New laws must be agreed upon to meet the new situations. The recommendations made concerning this matter by the committee of jurists meeting at The Hague in June and July, 1920, and denied by the League of Nations, will yet have to be accepted and acted upon.